Australian
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Bulletin

Up in smoke: will Clive Palmer's Singapore company be denied standing in its ISDS arbitration against Australia?

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Introduction and background

Since the 1950s, Western Australia ("WA" or the "State") has entered into over 70 state agreements and contracts with companies to develop major projects. These agreements, among their other purposes, enable the State to attract investors to finance these projects.[2]

In 2002, WA entered into a state agreement (State Agreement),[3] with Mineralogy Pty Ltd and International Minerals Pty Ltd (two Australian corporations owned by Clive Palmer, together referred to as "Mineralogy"), along with several other related entities for the exploration, mining and processing of iron ore in the Pilbara region, known as the Balmoral South Iron Ore Project (BSIOP).[4]

Palmer intended to sell BSIOP to Chinese government-owned corporations, replicating a deal under a similar prior agreement.[5] Mineralogy submitted a development proposal under the State Agreement in August 2012 (2012 Proposal), which was deemed manifestly inadequate by the State. However, instead of rejecting it, the Minister at the time did not to consider it or reply, despite an obligation to do so under the State Agreement.

This triggered a tortuous history of continual disputation between Palmer and the WA government.[6] The first round began with two arbitral proceedings resulting in two awards in favour of Mineralogy in 2014 (2014 Award) and 2019 (2019 Award) (collectively, "Awards"). In *Western Australia v Mineralogy Pty Ltd* (WA Decision), the State then filed an unsuccessful application to have the Awards set aside.[7]

To thwart Palmer's ability to recover so-called *exorbitant damages* under the Awards, the WA Parliament tabled a Bill (Amendment Bill) to amend the State Agreement,[8] which it then unilaterally enacted as the State Agreement (Amendment Act).[9] The Amendment Act extinguishes the State's liability not only under the Awards but also with respect to all disputes arising out of any future proposals under the State Agreement.[10]

The parliamentary debates on the Amendment Bill triggered a new race to the court by Mineralogy, first to enforce the Awards in Queensland, and subsequently the for an order by the Federal Court of Australia that the Amendment Bill declared unconstitutional by the High Court of Australia.[11]

At about the same time, Palmer shifted ownership of his two main Australian entities offshore, ultimately to Zeph Investments Pte Ltd (Zeph) a Singaporean company.[12] This was evidently aimed at being able to bring an investor-state dispute settlement (ISDS) claim against the Commonwealth of Australia ("Australia" or the "Commonwealth") under the Singapore–Australia Free Trade Agreement (SAFTA)[13] if unsuccessful in the arbitral and judicial proceedings in Australia.

To understand the nature of Palmer's potential ISDS claim and its chances of success, this article will examine the State Agreement, the Awards, the history of Palmer's companies, the Australian litigation and ultimately the obstacles Palmer's Singapore company will face if it commences an ISDS claim, including the jurisdictional hurdle of standing by drawing a parallel with *Philip Morris Asia Ltd v Commonwealth* (PM Asia Arbitration).[14]

The relevant clauses of the State Agreement

As stated above, the Minister deemed the 2012 Proposal manifestly inadequate with respect to cl 6 of the State Agreement which requires, inter alia, that a proposal contain sufficient details of services and works and the availability of financing.[15] It was the failure to comply with the requirements in cl 7 of the State Agreement that gave rise to the breach.

More specifically, cl 7(1) refers to the requirement to consider proposals. The Minister may approve or require alterations as a condition precedent to approval.[16] More importantly, pursuant to cl 7(2), the Minister must advise the proponent of the decision within 2 months of receipt of the proposal which did not occur.

Pursuant to cl 7(4), the Minister's failure to advise of his decision was subject to arbitration.

Clause 42(1) of the State Agreement contains a broadly worded arbitration clause:

> Any dispute or difference between the parties arising out of or in connection with this Agreement the construction of this Agreement or as to the rights duties or liabilities of the parties or any of them under this Agreement or as to any matter to be agreed upon between the parties under this Agreement shall in default of agreement between the parties and in the absence of any provision in this Agreement to the contrary be referred to and settled by arbitration under the provisions of the Commercial Arbitration Act 1985 and notwithstanding section 20(1) of that Act each party may be represented before the arbitrator by a duly qualified legal practitioner or other representative.

A dispute arose as to whether the 2012 Proposal constituted a valid proposal pursuant to cl 6 of the State Agreement that the Minister was required to deal with under cl 7.[17]

This dispute led to the first arbitration brought by Mineralogy against WA (First Arbitration).

The First Arbitration and the 2014 Award

On 7 November 2012, Mineralogy requested arbitration under the State Agreement claiming that the Minister failed to either consider the 2012 Proposal or provide the requisite notice. On 19 March 2013, former High Court Judge, Michael McHugh AC QC (McHugh), was appointed as arbitrator.

On 20 May 2014, McHugh made an award in which he found that the Minister had not properly considered the 2012 Proposal. He determined that the Minister's failure to communicate a decision amounted to a breach of the State Agreement, attracting liability for any damages suffered by Mineralogy.

The dispositive section of the 2014 Award consisted of a declaration that the 2012 Proposal was a valid proposal submitted under the State Agreement, with which the Minister was required to deal, and a costs order against WA (with which it complied). No damages were awarded under the 2014 Award.[18] The entitlement to damages for that breach was later determined in the 2019 Award (First Damages Claim).

The State did not appeal the declarations in the 2014 Award under the Commercial Arbitration Act 1985 (WA) (1985 Act).[19]

Subsequently, on 22 July 2014, the State imposed 46 conditions precedent (Conditions) for the approval of the 2012 Proposal pursuant to cl 7(1)(c).[20]

The Second Arbitration and the 2019 Award

On 2 August 2018, the parties referred what was to be called a "further" dispute to the same arbitrator[21] (Second Arbitration) in part to interpret the implications of the 2014 Award.

Palmer alleged that the Minister's decision to attach the Conditions to the 2012 Proposal was so unreasonable that it constituted a separate breach of the State Agreement, which attracted a separate and distinct claim for damages (Second Damages Claim). The State argued that Palmer's inordinate delay in bringing the claims was a sufficient ground for dismissal.[22]

McHugh was asked to determine the legal implications of the 2014 Award and Mineralogy's entitlement to damages.

The first two preliminary issues were whether Mineralogy's right to recover damages was determined in the 2014 Award and it was thereby barred from pursuing the First Damages Claim (Finality Issue) or, if the First Damages Claim remained to be determined in the First Arbitration in which case the arbitrator should adjourn the First Arbitration so the State could apply under the 1985 Act to terminate it.

A third issue was whether Mineralogy's delay in bringing the Second Damages Claim and its new claim that the Minister had erred in subjecting the 2012 Proposal to the Conditions, was "inordinate and inexcusable" and if so, whether those claims should be dismissed under s 25(2) of the Commercial Arbitration Act 2012 (WA) (2012 Act).[23]

On 11 October 2019, McHugh published the 2019 Award in which he ruled in favour of Mineralogy on all grounds.[24] Similar to the 2014 Award, the dispositive portion of the 2019 Award consisted solely of declarations.

On the Finality Issue, McHugh declared that the 2014 Award was a final award terminating the First Arbitration, and that at the commencement of the Second Arbitration, he was *functus officio* with respect to the First Arbitration.[25] As a consequence, he lacked jurisdiction to adjourn the proceedings.

McHugh further concluded that Mineralogy's right to recover damages had not been heard and determined in the 2014 Award and that Mineralogy was not prevented from pursuing the First Damages Claim for damages sustained in the period between the 2012 Proposal and the imposition of the Conditions, as well as the Second Damages Claim for damages after the imposition of the Conditions, arising out of breaches of the State Agreement (together the "Damages Claims"). Finally, McHugh declared there had not been inordinate and inexcusable delay by Mineralogy in progressing the Second Damages Claim.[26]

The Awards and the subsequent proceedings on damages (Damages Arbitration) triggered the preparation of the Amendment Bill resulting in the subsequent amendment to the State Agreement (Bill), which in turn forms the basis of Palmer's potential ISDS claim.

The third arbitral proceeding on damages

McHugh initially did not accept the appointment to determine the damages claims, but subsequently agreed to enter upon the reference and issued directions (Damages Arbitration).[27]

On 28 May 2020, Palmer submitted an amended statement of issues, facts and contentions, which also set out Mineralogy's damages claim (Statement of Damages). This is the document that was later used as proof of the damages in the deliberations on the Amendment Bill.[28]

On 8 July 2020, the State executed an agreement setting out the terms of McHugh's engagement.[29]

The hearing of the Damages Arbitration was scheduled to commence on 30 November 2020, with the award delivered by 12 February 2021.[30] On 14 August 2020, the State wrote to McHugh stating that the Damages Arbitration was terminated pursuant to the Amendment Act.[31]

In any event, the proceedings in the Damages Arbitration are in abeyance, pending the High Court's decision on the constitutionality of the Amendment Act, as discussed below.

The State's abortive attempt to appeal the 2019 Award

On 31 October 2019, the State unsuccessfully sought leave from the WA Supreme Court to appeal the 2019 Award under the 1985 Act.[32]

The basis for the State's appeal was that McHugh erred in law by determining that the breach of the State Agreement gave rise to two distinct causes of action, each of which was open to a separate claim for damages, and by declaring that Palmer was not precluded from pursuing those claims for damages.[33]

The difference between the 1985 Act and 2012 Act is that s 38(4) of the former Act allows an appeal on a question of law *either* with the parties' consent *or* with leave of the Supreme Court. Under s 34A(1) of the latter, an appeal will only be heard if the parties agree *and* the court grants leave.

The decisive issue for the application of the more favourable 1985 Act, rather than the narrower 2012 Act, was timing.[34] If unsuccessful, the State would be precluded from appealing the 2014 Award and any appeal against the 2019 Award would be limited.

Section 43 of the 2012 Act, which took effect on 7 August 2013, contains transitional provisions for arbitrations commenced prior to that date. For the provisions to apply, both the dispute must have arisen, and the arbitral tribunal been properly constituted, by that date.

In the WA Decision, Martin J held that McHugh was *functus officio* as regards the 2014 Arbitration and for the temporal assessment required by s 43(3)(b) of the 2012 Act, McHugh was only "constituted" to conduct the Second Arbitration when he entered upon the reference on 20 December 2018.[35]

Since the dispute and constitution of the arbitral tribunal both occurred post 2013, Martin J held that s 43(2) only applied to the 2014 Award and only that award fell under the repealed 1985 Act.[36] Thus, the 2019 Award would only be open to a limited challenge under the less favourable 2012 Act.[37]

As a result, the State was unable to prevent Palmer from pursuing the Damages Claims that it subsequently qualified by WA as *exorbitant*, which led to the preparation of the Amendment Bill.

The $30 billion damages claim that prompted the Amendment Bill

In communications to the media, Palmer indicated that the quantum of his claim for the lost opportunity to develop and sell the BSIOP was $30 billion. During the parliamentary debates, the State maintained that Palmer's damage claims were without precedent and outside the convention and practice of state agreements and that it would be fiscally irresponsible to expose WA to such a great risk.[38]

When Palmer later publicly denied the amount of his claim, stating that it was "bull excrement" (according to the more polite description used by Attorney-General Quigley),[39] the Attorney-General invoked parliamentary privilege and tabled the Statement of Damages submitted by Palmer in the Damages Arbitration.[40] In fact, the amount of the First Damages Claim alone reached some $27.75 billion,[41] or almost the equivalent of the State budget.[42]

It may be that had the amounts claimed been more modest, the State would not have felt compelled to take such draconian action.

The dash to enforce the Awards in Queensland

On 12 August 2020, as the Amendment Bill was being debated in Parliament, Palmer filed an ex parte application for the enforcement of the 2014 and 2019 Awards under s 35 of the Commercial Arbitration Act 2013 (Qld) (2013 Act) in the Queensland Supreme Court.

The matter was heard, and enforcement granted (Enforcement Order) on 13 August 2020.[43] The timing is important as the Amendment Act, which rendered the Awards null and void, took effect on the same date.

The Enforcement Order was clearly an attempt by Palmer to circumvent the consequences of the imminent passage of the Amendment Act.

Subsequently, in *Mineralogy Pty Ltd v Western Australia* the State appealed the Enforcement Order and on

25 November 2020, the Enforcement Order was set aside,[44] on the grounds that it was prejudicial to the State,[45] brought without notice — and therefore was not compliant with ss 35 and 36 of the 2013 Act,[46] and that the supporting submissions were misleading and inaccurate in law and fact.[47] Martin J held that such a material non-disclosure on an ex parte application constituted a breach of natural justice, which entitled the State to have the Enforcement Order set aside as of right.[48]

A most interesting issue arose as to whether declarations in an award can be enforced. However since the application did not address the issue, it unfortunately was not resolved.[49]

Mineralogy has since sought leave to appeal the set-aside decision to the Queensland Court of Appeal and to have the Enforcement Order reinstated.[50] Depending on the outcome of the High Court case on the constitutionality of the Amendment Act, the matter of the enforceability of the declarations made in the Awards may be revisited in the future.

Palmer's attempt to stave off the passage of the Bill

Concurrently, on 12 August 2020, Mineralogy filed an application in *Mineralogy Pty Ltd v State of Western Australia* (Federal Court Decision) seeking an order to require the State to withdraw the Amendment Bill and to participate in the arbitral proceedings.[51] Palmer argued that the Amendment Bill constituted a breach of the State Agreement, was unconscionable and violated the Australian Consumer Law.[52]

Insofar as the Amendment Act was passed in the interim, the proceeding was adjourned,[53] pending the High Court's decision on the validity of the Amendment Act.[54]

The Amendment Act that rewrote the State Agreement

On 13 August 2020, the Amendment Bill was signed by the WA Governor, and the Amendment Act became law.[55]

The purpose of the Amendment Act[56] was to protect the State by preventing Palmer and his related companies from pursuing damage claims in relation to any past or future proposals under the State Agreement.[57] Its detractors argue the Amendment Act is contrary to the rule of law and the State's constitution.[58] While such criticism may be justified insofar as the Amendment Act terminates all proceedings, extinguishes the Awards and all liability arising therefrom and establishes broad indemnities in favour of the State, including in relation to international proceedings,[59] it is nonetheless debatable whether the State Agreement should have included such onerous obligations or even arbitration from the start. Another question is whether Palmer accepted sovereign risk when he entered into the State Agreement.

The provisions of the Amendment Act apply to past and present matters related to the BSIOP and the 2012 Proposal. Disputed matters specifically include the State's 2012, 2013 and 2014 actions or omissions in respect of the 2012 Proposal and any conduct connected with it or with the BSIOP (Disputed Matters).[60] Protected matters cover all actions taken to deal with Disputed Matters, including the Amendment Bill and the Amendment Act, arising before or after its enactment (Protected Matters).[61] These distinctions and the sections referred to below are the most relevant to Palmer's ISDS Claim and form the basis of the constitutional challenge before the High Court.

First, pursuant to s 9 of the Amendment Act, the 2012 Proposal has no contractual or other legal effect.

Section 10 remarkably terminates any arbitration and mediation proceedings in progress and nullifies the Awards and the arbitration agreement with retrospective effect.

Section 11 extinguishes all liability of the State with respect to Disputed Matters and any proceedings related to loss or liability against the State on and after commencement of the Amendment Act.

Under s 12 there can be no appeal against or review of any conduct of the State concerning the Disputed Matters. The rules of natural justice, including any duty of procedural fairness, do not apply.

Sections 14 and 15 require each "relevant person" (meaning Palmer and his companies) to indemnify the State against any loss or liability, including legal costs, related to the 2012 Proposal or the BSIOP.

Section 18 is important as it provides a blanket protection to the State for all conduct relating to Protected Matters, which can never give rise to the commission of a civil wrong. Section 18(5) regulates and renders inadmissible evidence related to such conduct that is against the interests of the State.

In this connection, s 21 goes even further as it even precludes all applications under s 11 of the Freedom of Information Act 1992 (WA) related to a Disputed Matter.

Also relevant to the ISDS claim and the High Court proceedings are s 19, which states that no proceedings can be brought against the State (s 19(3)) and the State has no liability for any loss related to a Protected Matter, and s 20 stating there is no right of appeal.[62]

More particularly, ss 16 and s 24 of the Amendment Act extend the indemnities described above to include proceedings against the Commonwealth.

In the Volterra Fietta letter dated 14 October 2020 to Senator the Hon Marise Payne (Consultation Letter),[63] in which Palmer's solicitors, commenced consultations under SAFTA on behalf of Zeph (SAFTA Consultations), they claim that not only he and his Australian companies are precluded from pursuing the Damages Claims and their legal rights in the ongoing arbitral proceedings and lawsuits, but also that Zeph may be similarly prevented from commencing an ISDS arbitration if the SAFTA Consultations are unsuccessful.[64]

As demonstrated below, Zeph did not exist at the time of the 2012 Proposal or the initial arbitral proceedings. However, Palmer has characterised Zeph as an indirect investor and therefore a "relevant person".[65] If Palmer is successful in establishing this and the challenge to the constitutionality of the Amendment Act is dismissed, Zeph could indeed be precluded from bringing an ISDS claim, or risk being exposed to the same indemnities.

It is important to note that the Amendment Act does not prohibit Palmer from submitting a new proposal if he wishes to pursue the BSIOP. That right was neither modified nor removed. Only the dispute resolution provisions applicable to a new proposal have changed. In fact, Palmer and Mineralogy could have submitted other proposals or negotiated with the State at any time to mitigate their alleged losses, rather than adopt a litigious strategy.

The search for a foreign corporate nationality to bring an ISDS claim

Against the backdrop of the disputes in Australia, and so as to be able to mount an ISDS claim, Palmer began the search for a new nationality for his Australian companies.[66] To be eligible to bring an ISDS claim and benefit from treaty protections, an investor must be *foreign*.

The first stop was New Zealand. In mid-December 2018, Palmer incorporated Mineralogy International Ltd there (Mineralogy International), to which ownership of Mineralogy was transferred. This first attempt at treaty shopping proved futile, as Australia and New Zealand's successive trade agreements explicitly exclude investor-state claims.[67]

As a result, Palmer set his sights further afield and on 21 January 2019, he incorporated Mineralogy International Pte Ltd in Singapore, ostensibly as a ship-building company.[68] In January 2020, he changed the name of the Singaporean entity to Zeph.[69]

Zeph's sole shareholder is Mineralogy International. Zeph also owns all of the shares in Mineralogy, which in turn owns the shares of International Minerals. However, at the end of the day, all of the beneficial interests in the shares in all of the companies are held by Palmer, who is also a director of each company.[70]

Palmer's solicitors assert that Zeph is an indirect investor for the purposes of Ch 8 of SAFTA as it is a corporation under Singaporean law and Mineralogy and International Minerals, both of which are Australian companies, are its subsidiaries.[71]

In contrast to the Australia-New Zealand treaties, SAFTA does contain ISDS provisions that protect legitimate foreign entities investing in one of its contracting states.[72] Nevertheless, it is suggested that Palmer will encounter obstacles in bringing an ISDS claim and will have to prove from the outset that Zeph has standing as an investor under SAFTA, as discussed in greater detail below.

The three concurrent High Court proceedings

To better understand the grounds for the SAFTA Consultations commenced by Zeph and the potential future request for arbitration, a closer look the three proceedings in the High Court brought by Palmer, Mineralogy and Zeph is warranted.

Palmer and Mineralogy's constitutional challenges of the Amendment Act

In September 2020, Palmer commenced Proceeding No B52/2020 (B52) in his personal name[73] and B54/2020 (B54)[74] by Mineralogy. Both allege that the Amendment Act is unconstitutional.

It is argued that the Parliament of WA exceeded its legislative power when it enacted the Amendment Bill,[75] and that Palmer and his companies were denied natural justice.[76] The two proceedings are being heard together, therefore only B54 will be discussed herein.[77]

In B54, Mineralogy seeks declarations that either the Amending Act in its entirety, or alternatively a number of its provisions (including the majority of those set forth above and detailed in the Consultation Letter) are invalid, that a number of other sections contravene s 118 of the Commonwealth Constitution or s 6 of the Australia Act 1986 (Cth), and that provisions in other sections are inconsistent with the Constitution as well as with various Federal Acts.[78]

The High Court's decision on the constitutionality of the Amendment Act is not only important with respect to the resumption by Palmer of any proceedings on foot in Australia but may also serve to nullify the grounds for any future ISDS claim.

Proceeding B57/2020 against the State

On 25 September 2020, Palmer's Singaporean company, Zeph, made its first appearance in this surfeit of litigation, in *Zeph Investments Pte Ltd v State of Western Australia* (B57).

Like Palmer and Mineralogy, Zeph too seeks a declaration that certain provisions of the Amendment Act be deemed invalid.[79] Although Zeph subsequently

filed a notice of discontinuance, it is worth examining the arguments and documents from this proceeding as they set forth the basis for the potential ISDS claim.[80]

Through Zeph, in addition to the declarations sought in B54, Palmer argues that the Amendment Act interferes with the performance of the Commonwealth's obligations under SAFTA[81] and is inconsistent with the International Arbitration Act 1974 (Cth),[82] in that it impairs Zeph's ability to request an ISDS arbitration against the Australian government for breaches of SAFTA.

More specifically, Zeph seeks a declaration that the certain sections or provisions (Impugned Sections) of the Amendment Act are inoperative and/or inapplicable to any International Centre for Settlement of Investment Disputes (ICSID) Convention arbitration brought by Zeph against the Commonwealth as well as any award in Zeph's favour.[83]

Palmer, through Zeph, further alleges that the Impugned Sections breach Arts 4, 5, 6 and 13 of Ch 8 of SAFTA, that is, Australia's obligation to afford to his companies fair and equitable treatment, no less favourable treatment than to its own investors and to comply with the most favoured nation clause.[84]

If Zeph decides to submit the dispute to arbitration, the claims are likely to involve issues including the introduction and passage of the Amendment Bill and the enactment of the Amendment Act[85] which, unless the Amendment Act is declared unconstitutional, are Protected Matters. The damages sought are likely to be full compensation for any diminution in the economic value of the BSIOP investment as well as the value of the lost opportunity to pursue Mineralogy's claims in the Damages Arbitration.[86]

Consequently, for all intents and purposes, Palmer, through Zeph, would be seeking the same damages from an international arbitral tribunal as those claimed by Mineralogy in the Damages Arbitration before McHugh.

Interestingly, Zeph uses its corporate structure and the fact that Palmer is the ultimate owner of all of the companies[87] as grounds for asserting that Zeph is prevented, impeded or deterred from "commencing the SAFTA dispute settlement process, submitting a claim and conducting an ICSID Convention arbitration and stating an intention or threatening to do either", or that the enforcement of any favourable award would be undermined.[88]

Yet Palmer's ultimate ownership and the corporate structure of his companies may impact Zeph's standing to bring an ISDS claim as a foreign investor, irrespective of whether the Amendment Act breached SAFTA or is deemed constitutional or not by the High Court.

Despite the above assertions, the Amendment Act has not prevented Zeph from commencing the SAFTA dispute settlement process as Zeph's solicitors have already initiated the Consultations under Art 23(1) of SAFTA and reserved the right to commence arbitration through the Consultation Letter.[89]

The State, suggests that Zeph cannot decide whether to go through with its SAFTA claim until the relevant provisions of the Amendment Act are either upheld or invalidated, which will also determine the fate of the indemnity provisions, and whether the State is ordered to participate in the Damages Arbitration, in which case Zeph would no longer have a basis for its ISDS claim.[90]

The Consultations have now been under way for over 6 months but whether the parties are still negotiating or if a notice of arbitration has been filed is not known at present.

Treaty shopping and standing

As stated above, a company must be a legitimate foreign investor to have standing to bring an ISDS claim. Establishing this could prove to be a significant difficulty for Zeph.

To meet this criterion, domestic companies sometimes engage in treaty shopping, which can be grounds for exclusion of a claim.[91]

For example, when an investment structure is planned beforehand for legitimate reasons including tax, a favourable regulatory environment or requirement by the laws of the state in which the investment is made, is so-called front-end treaty shopping and is generally acceptable.[92]

On the other hand, back-end treaty shopping is when a domestic corporation restructures its ownership once a dispute has arisen or is foreseeable solely to benefit from ISDS protections as an international investor. This is the more common use of the term "treaty shopping" and claims by such investors will likely fail on a jurisdictional challenge to standing and/or be deemed an abuse of process or rights.[93]

More and more, arbitral tribunals are examining the corporate to determine if a company is genuinely foreign — or in reality domestic, or even piercing the corporate veil, particularly if the dispute was foreseeable at the time of the restructuring.[94] They will also seek to ascertain whether the foreign investor actually exercises control over the company and/or the investment.

In examining whether Zeph could bring a claim against the Commonwealth under SAFTA, some have contended that the enactment of the Amendment Act constitutes a denial of justice and a clear breach of the treaty. While this may be true, it does not necessarily follow that Zeph, as has been asserted, would be entitled to invoke SAFTA's fair and equitable treatment protections,[95] as the analysis is not that simple. Since Zeph

was incorporated in 2019, some 7 years *after* the dispute arose, it is the writer's view that Palmer's restructuring of his companies would likely be characterised as treaty shopping.

Will Zeph be the New Philip Morris Asia?

A comparison with the Philip Morris Asia Ltd (PM Asia) Arbitration is instructive on the question of standing. While this dispute also involved the constitutionality of legislation, namely the plain packaging legislation,[96] the most striking similarity with the present discussion is the restructuring of the Australian company, Philip Morris Pty Ltd, in an attempt to benefit from protections under Australia's existing treaty with Hong Kong at the time.[97]

PM Asia was found to have obtained control of the Australian trademarks principally, if not solely, to gain investment treaty protection when the dispute arising out of the plain packaging legislation was foreseeable.[98] Like PM Asia, Palmer moved ownership of his companies' assets offshore. Importantly, Zeph had no interest or investment in Australia at the time of the 2012 Proposal, but like PM Asia, it gained control of the investment after the fact and, in Zeph's case, not only once was the dispute foreseeable but after it had already arisen. It is the author's opinion that Palmer will be hard-pressed to prove that, at that time of the restructuring, the dispute was not foreseeable.

In the PM Asia Arbitration, the tribunal determined that the claim was an abuse of right in that the dispute was foreseeable at the time of the restructuring and declined jurisdiction to hear the claims on the merits.[99]

In light of the Singaporean entity's apparent lack of any involvement with Mineralogy, the 2012 Proposal or the Awards, the author submits that there is a risk a tribunal would conclude that Zeph gained control of Palmer's Australian entities to gain treaty protection as the tribunal in the PM Asia Arbitration did.[100]

Before examining the pertinent provisions of SAFTA, it is important to note that Zeph will face an additional hurdle compared to PM Asia, as unlike the former Hong Kong-Australia treaty, SAFTA contains a "denial of benefits" clause. These clauses are being progressively inserted in investment treaties to counter claims made by domestic corporations veiled as foreign entities.

Article 18(1) of SAFTA entitles a state to deny benefits if the investor is owned or controlled by a national of the country denying the benefit, in this case, Australia, and has no substantial business activities in the territory of the other Party, that is, Singapore.

As stated above, Palmer, an Australian national, owns and controls Zeph, the purported investor. It is unknown whether Zeph conducts any relevant business activity in Singapore where it is registered as a foreign manpower contracting services company, as the only record of any activity of Zeph is its corporate filings.[101] The only activity know publicly in Australia is as the plaintiff in the High Court proceedings in B57.

If a tribunal finds that Zeph is not a foreign investor under SAFTA, it will deny Zeph the benefits of the treaty and decline jurisdiction.

Validity of a potential ISDS claim

Interestingly, in the Consultation Letter, Zeph's solicitor states that it is raising the dispute on its own behalf *as well as* on behalf of Palmer's Australian companies, which are together characterised as the "Zeph Group".[102] It is unclear what rights the Australian companies would have in a SAFTA arbitration and it seems this moniker is being used to associate Zeph with the underlying dispute to establish standing.

The Consultation Letter also discloses that Zeph reserves its right to refer the dispute to arbitration pursuant to Art 24 in Ch 8 of SAFTA if it is not settled within the 6-month period,[103] on the grounds that Zeph's investments in Australia described as its "direct shareholding in Mineralogy and indirect shareholding in International Minerals", have suffered significant harm due to the Amendment Act and that the latter violates Australia's obligations under SAFTA.[104]

To determine the validity of an ISDS claim by Zeph if it were to succeed on standing, a closer look at the invoked sections of the treaty is required.

First, Art 1(k) of SAFTA defines an investment as an asset owned or controlled (directly or indirectly) by an investor, including through the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Examples of covered investments are construction, management or production projects, revenue-sharing contracts, related property rights, and so on.[105]

At first glance, Zeph's claimed investment could be deemed a covered investment under SAFTA. This, however, would be contingent on Zeph establishing it had committed resources and had a level of control over the investment, which could be problematic in light of the fact that Zeph was not a party to the State Agreement, involved in the 2012 Proposal and did not exist until after the dispute had arisen.

It is alleged in the Consultation Letter that Australia has breached its obligations under four of the key principles of SAFTA.[106]

First, Art 6 states that covered investments should be afforded the customary international law minimum standard of treatment which includes "fair and equitable treatment". It is undeniable that the Amendment Act is unfair — s 12 specifically states that the rules of natural

justice, procedural fairness, do not apply. But the standard only applies to *foreign investors* with a covered investment. Again, Zeph will have to prove it meets those criteria — which harks back to the preliminary question of standing — to succeed in a claim under Art 6.

Article 5 embodies a classic "most-favoured nation" clause that ensures investors are treated no less favourably than investors of any other third country.

Interestingly, Art 4, entitled "National Treatment", obliges a party to treat investors no less favourably than its own investors. It is somewhat ironic that Zeph invokes a breach of Art 4 as such a claim would require Zeph to plead that it was treated differently from the very companies it now owns.

Although there is no blackletter law in ISDS in general — nor a specific provision in SAFTA — that requires a party to first exhaust all local remedies, it may be preferable for parties to do so to avoid parallel proceedings.[107] Furthermore, Art 24(1) requires evidence of an obligation having been breached and loss or damage incurred. As stated above, this will not be known until the High Court hands down its decision on the validity of the Amendment Act.

If the High Court upholds the Amendment Act, SAFTA contains a supplementary exclusion that could inhibit Palmer's chances of success. Article 1(k) excludes orders or judgments entered in a judicial or administrative action from treaty protection.[108] It is submitted that a decision of the High Court could qualify as such a judgment.

These are some of the obstacles that Palmer's Singaporean company will face if it commences arbitration against the Commonwealth under SAFTA.

Conclusion

The broadly recognised purpose of ISDS is to promote investment and economic cooperation by affording protection to eligible investors.[109] In the author's view, even inexcusable acts by a state — and this article does not purport to defend the Amendment Act — do not justify an abuse of process or rights by ineligible investors.

However, such attempts are few and far between compared to legitimate claims, and Australia should not use this situation to justify removing ISDS provisions from its treaties.[110] Citing the cost of defending a claim as justification is also a red herring. If Zeph commences arbitration and the Commonwealth succeeds on jurisdiction, in all likelihood it will be awarded costs as it was in the PM Asia Arbitration.[111] Nor should this particular dispute tarnish the reputation of Australia as some fear.[112] Australian courts have built a solid reputation as being supportive of arbitration. The invalidation of the Awards by the Amendment Act must be examined in light of the exceptional circumstances surrounding these disputes.

Palmer has hedged his bets by commencing consultations under SAFTA. A suggestion is for Palmer and the WA (and Australian) government to follow the wise and sensible approach of Greenwood ACJ in the Federal Court Decision, and conduct proceedings to facilitate the just and efficient resolution of disputes until the High Court hands down its determination on the constitutionality of the Amendment Act.[113] If the parties also engage in good faith in the SAFTA Consultations, they might find a more pragmatic solution, especially since Palmer's right to submit a new proposal for the BSIOP remains intact. This could be the most sensible way forward and end a litany of court and arbitral proceedings and further costs and risks to all involved.

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Footnotes

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2. Jodi Reinmuth and others, A Decade of State Agreements in Western Australia: Trends and Predictions, 13 August 2020, www.allens.com.au/insights-news/insights/hubs/forging-ahead-legal-update-on-the-wa-mining-construction/a-decade-of-state-agreements-in-western-australia-trends/.
3. The State Agreement is set forth in Sch 1 and the 2008 variation in Sch 2 of the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA).
4. WA Hansard, Legislative Council, 13 August 2020, 4902 (Robin Chapple). Mineralogy and International Minerals Pty Ltd were the two primary companies. There were some four other companies that it was later learned were all owned by Palmer and his wife, and allegedly used to give greater credibility to the BSIOP.
5. The Sino Iron project between similar parties and the State has been subject to a labyrinthine series of lawsuits amongst the parties: see eg, *Sino Iron Pty Ltd v Mineralogy Pty Ltd* [2019] FCA 675; BC201904063 at [7]; *Mineralogy Pty Ltd v Sino Iron Pty Ltd* [2021] WASC 45; BC202101070.
6. Including defamation suits, a withdrawn contempt suit and an unsuccessful constitutional challenge to WA's border closure decisions: *Palmer v Western Australia* (2021) 388 ALR 180;

[2021] HCA 5; BC202101051. See also J Kagi, F Bell and E Laschon "Clive Palmer suing WA Premier Mark McGowan, Attorney-General John Quigley for 'contempt of High Court'" *ABC News* 26 August 2020 www.abc.net.au/news/2020-08-26/clive-palmer-suing-mark-mcgowan-john-quigley-in-new-legal-action/12596538.

7. *Western Australia v Mineralogy Pty Ltd* [2020] WASC 58; BC202001248.
8. Iron Ore Processing (Mineralogy Pty Ltd) Agreement Bill 2020 (WA).
9. Iron Ore Processing (Mineralogy Pty Ltd) Agreement Amendment Act 2020 (WA) which amended the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002 (WA) and thereby the State Agreement.
10. Above, s 17.
11. *Mineralogy Pty Ltd v Western Australia* [2020] QSC 344; BC202011587 (Queensland Decision); *Mineralogy Pty Ltd v State of Western Australia* [2020] FCA 1517; BC202010176 (Federal Court Decision); *Mineralogy Pty Ltd v Western Australia* (HCA, B54/2020) (B54) and *Palmer v Western Australia* (HCA, B52/2020) (B52).
12. OpenCorporates, Zeph Investments Pte Ltd, 8 January 2020, https://opencorporates.com/companies/au/632245599.
13. *Singapore-Australia Free Trade Agreement*, Singapore-Australia, signed 17 February 2003, [2003] ATS 16 (entered into force 28 July 2003).
14. *Philip Morris Asia Ltd v Commonwealth* (UNCITRAL, PCA Case No 2012-12) www.italaw.com/cases/851.
15. WA Hansard, Legislative Assembly, 10 June 2014, pp 3573–3574 (Colin Barnett). Notably, while Palmer had obtained a letter of intent from the Industrial and Commercial Bank of China, there is no evidence that the financing was confirmed as required by cl 6(6)(b)(i) of the State Agreement, yet the Minister did not provide notification under cl 6(8) either.
16. A number of the obligations under cl 7 are subject to the Environmental Protection Act 1986 (WA) and/or native title rights.
17. Mineralogy Pty Ltd, Plaintiff's Statement of Claim, Writ of Summons in *Zeph Investments Pte Ltd v Western Australia* (HCA, B54/2020, 18 September 2020) at 5.
18. Queensland Decision, above n 11, at [11].
19. The letter from State Solicitor Nicholas Egan dated 13 August 2020, cited in Nick Seddon, The Palmer Act, 31 August 2020, https://auspublaw.org/2020/08/the-palmer-act.
20. Above n 3, at cl 7(1)(c).
21. Above n 7, at [19]. Initially, WA requested an arbitration over which Ray Finkelstein AO QC was to preside: at [52].
22. Above n 7, at [51].
23. Above n 7, at [40].
24. Above n 7, at [41].
25. Above n 7, at [36].
26. Above n 7, at [41].
27. Above n 7, at [52].
28. WA Hansard, Legislative Assembly, 18 August 2020, p 5114 (John Quigley).
29. Zeph Investments Pte Ltd, "Plaintiff's Written Submissions: Directions Hearing 16 November 2020", Submission in *Zeph Investments Pte Ltd v State of Western Australia* (HCA, B57/2020, 16 November 2020) Annexure D at 29. One month later the Hon Wayne Martin AC QC was also confirmed at the time as mediator.
30. Zeph Investments Pte Ltd, 'Plaintiff's Statement of Claim', Writ of Summons in *Zeph Investments Pte Ltd v Western Australia* (HCA, B57/2020, 25 September 2020) at 7.
31. Above n 29, at 32.
32. Above n 7.
33. The two respondents in that action, Mineralogy and International Minerals, countered with two individual applications for summary dismissal of the State's claim.
34. Above n 7, at [2]–[3].
35. Above n 7, at [76]–[77].
36. Above n 7, at [27].
37. The State had simultaneously brought proceeding ARB 9 of 2019 under the Commercial Arbitration Act 2012 (WA), s 34. This was discontinued by the State on 12 March 2020: above n 29.
38. Above n 28, pp 5114–5115.
39. Above.
40. Palmer brought an action for contempt and breach of arbitral confidentiality, even though Palmer had himself tendered the Awards to the Queensland Parliament to garnish support for his case. See H Hastie "Palmer still suing McGowan for defamation, but offers to withdraw contempt of court case" *WA Today* 11 January 2021 www.watoday.com.au/politics/western-australia/palmer-still-suing-mcgowan-for-defamation-but-offers-to-withdraw-contempt-of-court-case-20210111-p56t7t.html.
41. Above n 28. The damages sought total US$19.99 billion (AU$27.67 billion), plus US$3.77 billion in interest calculated at 6% since 2012, and incidental claims for costs.
42. WA Hansard, Legislative Assembly, 11 August 2020, p 4597 (John Quigley).
43. Queensland Decision, above n 11, at [14].
44. Above.
45. Queensland Decision, above n 11, at [64]–[65].
46. Queensland Decision, above n 11, at [76] and [86].
47. Queensland Decision, above n 11, at [124].
48. Queensland Decision, above n 11, at [90].
49. Queensland Decision, above n 11, at [75]. Apparently, this "is not a power present" under s 35 of the Commercial Arbitration Act 2013 (Qld).
50. Notice of Appeal, *Mineralogy Pty Ltd v Western Australia* (QSC, BS8766/2020, 16 December 2020).
51. Federal Court Decision, above n 11, at [11].
52. Federal Court Decision, above n 11, at [7].
53. Federal Court Decision, above n 11, at [1] and [45]. Adjourned on 19 October 2020.
54. Federal Court Decision, above n 11, at [1].

55. The Amendment Bill was signed at 10.30 pm. However, the legislation took effect from the beginning of the day on which it was given Royal Assent: Interpretation Act 1984 (WA), s 21.
56. The Act has also been termed the "Palmer Act": Seddon, above n 19.
57. The purpose of the Amendment Bill was to prevent damages and claims arising or potentially arising from proposals that were submitted under the State Agreement: above n 42, pp 4594–4599.
58. See eg, Law Society of Western Australia "Media Statement on the Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act" media release (19 August 2020) www.lawsocietywa.asn.au/news/media-statement-on-the-iron-ore-processing-mineralogy-agreement-act/.
59. Above n 9, ss 14–15.
60. Above n 9.
61. Above.
62. Compare above n 9, ss 11–12.
63. Above n 29, at 26–34.
64. Above; above n 30, at 9, 18, 24 and 28.
65. Above n 30, at 32.
66. Company searches reveal that Mineralogy was incorporated in 1985 and International Minerals (formerly Binowee) in 1992, both in Queensland.
67. *Australia-New Zealand Closer Economic Relations Trade Agreement*, Australia-New Zealand, signed 28 March 1983 (entered into force 1 January 1983); *Agreement Establishing the ASEAN-Australia-New Zealand Free Trade Area*, ASEAN-Australia-New Zealand, signed 27 February 2009 [2010] ATS 1 (entered into force 10 January 2010); *Trans Pacific Partnership Agreement between the Government of Australia and the Governments of: Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States of America and Vietnam*, signed 4 February 2016, [2016] ATNIF 2. The exclusion is found in "side letters" between the foreign ministries, which are incorporated into the agreements. See "Letter from Steven Ciobo to David Parker", 8 March 2018; "Letter from Simon Crean to Tim Groser", 27 February 2009. Note that side letters are recognised as forming part of the full text of the current New Zealand-Australia free trade agreements: Department of Foreign Affairs and Trade, TPP Text and Associated Documents, 21 May 2019, www.dfat.gov.au/trade/agreements/not-yet-in-force/tpp/Pages/tpp-text-and-associated-documents; Department of Foreign Affairs and Trade, ASEAN-Australia-New Zealand AANZFTA: official documents, 19 December 2018, www.dfat.gov.au/trade/agreements/in-force/aanzfta/official-documents/Pages/official-documents.
68. Singapore Company Directory, Mineralogy International Pte Ltd, 2 April 2021 https://sg.ltddir.com/companies/mineralogy-international-pte-ltd/. While initially, Zeph might have been created to bring an ISDS claim in the dispute over the Sino Iron project, it is unlikely that would affect Zeph's standing in the current dispute: see N Evans, Palmer to Put Himself First with Singapore Sling, 12 February 2019, https://thewest.com.au/business/mining/palmer-to-put-himself-first-with-singapore-sling-ng-b881101575z.
69. OpenCorporates, above n 12. It appears that Zeph is registered as a foreign company based in Queensland and a branch of incorporated Mineralogy International Pte Ltd.
70. Zeph Investments Pte Ltd, Notice of Constitutional Matter in *Zeph Investments Pte Ltd v Western Australia* (HCA, B57/2020, 25 September 2020) at 5.
71. Above n 30, at 12–13.
72. SAFTA, above n 13, Ch 8.
73. B52, above n 11.
74. B54, above n 11.
75. Federal Court Decision, above n 11, at [2]–[3].
76. Transcript of Proceedings *Palmer v Western Australia; Mineralogy Pty Ltd v Western Australia* [2021] HCATrans 2 at [150].
77. Above, at [85] and [95]. Both B52 and B54, like the Federal Court proceeding, were initially aimed at preventing the passage of the Bill and were brought under ACL. Since the enactment of the Amendment, they have been amended.
78. Mineralogy Pty Ltd, Notice of Additional Constitutional Matters, *Mineralogy Pty Ltd v Western Australia*, B54/2020, 19 October 2020 at 28; See, eg, above n 9, ss 8(3)–8(5), 11(1)–(7), 12(1)–(2), 12(4)–(7), 13(4)–(8), 14(7)(b), 17(4)–(5), 18(1)–(3), 18(5)–(7), 19(1)–(7), 20(1)–(10), 21(4)–(8), 22(7)(b), 25(4)–(5).
79. Above n 30, at 29 and 30.
80. Zeph Investments Pte Ltd, Notice of Discontinuance in *Zeph Investments Pte Ltd v Western Australia* (HCA, B57/2020, 25 September 2020).
81. Above n 30, at 25–26.
82. Above n 30, at 18–19.
83. Above n 30, at 29–30.
84. Above n 30, at 18.
85. Above n 29, at 16–17.
86. Above.
87. Above n 30, at 18.
88. Above.
89. Above n 29, at 26.
90. State of Western Australia, "Written Submissions of the Defendant: Directions Hearing on 9 October 2020, Submission in *Zeph Investments Pte Ltd v Western Australia* (HCA, B57/2020, 9 October 2020) at 6.
91. Treaty shopping is also referred to as nationality or protection shopping.
92. See eg, Donna Ross and Samira Lindsey, Strike While the Iron is Hot or Strike Out: Would Palmer's Singapore Entity Succeed Against Australia, 27 December 2020, www.investmentandcommercialarbitrationreview.com/post/strike-while-the-iron-is-hot-or-strike-out-would-palmer-s-singapore-entity-succeed-against-australia.
93. Above. See also, O Susler and T Wilson "Restoring Balance in Investor State Dispute Settlement: Addressing Treaty Shopping

and Indirect Expropriation Claims and Consistent Approaches to Decision-Making" (2018) 84(1) *International Journal of Arbitration, Mediation and Dispute Management* 38 at 40.

94. Above n 14, at [588]. See generally R Thorn and J Doucleff, "Disregarding the Corporate Veil and Denial of Benefits Clauses: Testing Treaty Language and the Concept of 'Investor'" in *The Backlash Against Investment Arbitration,* M Waibel and others (eds), Kluwer Law International, 2010, 3 at pp 18–21.
95. M Pelly and B Thompson "WA's Palmer legislation could end up costing the Commonwealth billions" *Australian Financial Review* 18 August 2020 www.afr.com/companies/mining/was-palmer-legislation-could-end-up-costing-the-commonwealth-billions-20200818-p55mum.
96. Tobacco Plain Packaging Act 2011 (Cth).
97. Above n 14, at [584]. *Australia-Hong Kong Investment Agreement,* Australia-Hong Kong-China SAR, signed 15 September 1993 [1993] ATS 30 (entered into force 15 October 1993). This treaty terminated on 17 January 2020 and was replaced by *Australia-Hong Kong Investment Agreement*, Australia-Hong Kong-China SAR, signed 26 March 2019, [2020] ATS 5 (entered into force 17 January 2020).
98. Above n 14, at [569].
99. Above n 14, at [585] and [588]. Regarding abuse of process see *Phoenix Action Ltd v Czech Republic* (*Award*) (ICSID Arbitral Tribunal, Case No ARB/06/5, 15 April 2009) at [92]–[93] www.italaw.com/cases/850.
100. While there is no doctrine on precedents in ISDS, decisions are more commonly reported and followed by tribunals than in international commercial arbitration. See eg, B Gessel-Kalinowska vel Kalisz and K Czech, The Role of Precedent in Investment Treaty Arbitration, 27 April 2020, www.lexology.com/library/detail.aspx?g=aa675341-feae-4831-9e59-5a919737be11; J P Commission "Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence' (2007) 24(2) *Journal of International Arbitration* 129 at 129, 130, 135, 155 and 156; *AES Corporation v Argentine Republic* (*Decision on Jurisdiction*) (ICSID Arbitral Tribunal, Case No ARB/02/17, 26 April 2005) at [26].
101. Company information about Zeph Investments Pte Ltd available at www.tis.bizfile.gov.sg/.
102. Above n 29, at 26.
103. Above n 29, at 27.
104. Above.
105. For a list of examples, see SAFTA, above n 13, ch 8 art 1 definition of "investment" at para (k).
106. Above n 29, at 32.
107. This is also why the arbitral and judicial proceedings in Australia are currently in abeyance. See generally, R French "Investor-State Dispute Settlement — A Cut Above the Courts?" (Speech, Supreme and Federal Courts Judges' Conference, 9 July 2014) www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj09jul14.pdf.
108. Above n 13, ch 8 art 1 definition of "investment" at para (k).
109. See eg, A Monichino "Investor-State Arbitration a Vital Safeguard" (2014) 1(1) *CIArb Australia News* 23.
110. P Ranald *Submission to the DFAT Review of Australia's Bilateral Investment Treaties* Australia Fair Trade and Investment Network Report (September 2020) 9 www.dfat.gov.au/sites/default/files/bit-review-submission-aftinet.pdf.
111. *PM Asia Arbitration* (Final Award Regarding Costs, UNCITRAL, PCA Case No 2012-12, 8 July 2017) at [105] www.italaw.com/sites/default/files/case-documents/italaw9212.pdf: PM Asia was ordered to pay costs and 1.5% interest under Art 40(2) of the UNCITRAL Arbitration Rules 2010, however, the quantum has been redacted.
112. J So "WA government may have 'undermined the reputation of Australia as a pro-arbitration seat'", *Australasian Lawyer* 12 November 2020 www.thelawyermag.com/au/news/general/wa-government-may-have-undermined-the-reputation-of-australia-as-a-pro-arbitration-seat/238777.
113. Referring to the overarching purpose in s 37N of the Federal Court of Australia Act 1976 (Cth): above n 11, at [44].